

IN THE
Supreme Court of the United States

JOHN G. SPIRKO, JR.,

Petitioner,

v.

MARGARET BRADSHAW,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

**BRIEF FOR AMICI CURIAE THE HONORABLE JOHN J.
GIBBONS, THE HONORABLE TIMOTHY K. LEWIS, THE
HONORABLE WILLIAM S. SESSIONS, AND THOMAS P.
SULLIVAN, AS AMICI CURIAE IN SUPPORT OF
PETITIONER**

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The Honorable John J. Gibbons, the Honorable Timothy K. Lewis, the Honorable William S. Sessions, and Thomas P. Sullivan, submit this *amici curiae* brief in support of the petitioner, John G. Spirko, Jr.¹

¹ No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. *Amici* have obtained consent to file this brief from both parties.

STATEMENT OF INTEREST

Amici curiae are former prosecutors and judges who maintain an active interest in the fair and effective functioning of the criminal justice system.² This interest is born not only out of a desire that criminal defendants receive fair and just treatment, but also out of a drive to protect the integrity of, and public confidence in, the justice system. This brief focuses on the prosecution's failure to disclose exculpatory evidence, its decision to present at trial a theory of the case inconsistent with that undisclosed evidence, and its conduct at trial.

It may be that due process allows a prosecutor in the ordinary criminal case to split hairs when it comes to deciding whether particular evidence is exculpatory, and what must be disclosed about that evidence. But when the death penalty is at stake, due process requires prosecutors to be absolutely scrupulous in their handling of exculpatory evidence. As the

² The Honorable John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. The Honorable Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and of the United States District Court of the Western District of Pennsylvania from 1991 to 1992. The Honorable William S. Sessions served as a judge for the United States District Court for the Western District of Texas from 1974 to 1980, and as Chief Judge of that court from 1980 to 1987. He also served as Director of the Federal Bureau of Investigation from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981. He also served as Co-Chair of the Illinois Governor's Commission on Capital Punishment.

bipartisan Death Penalty Initiative of the Constitution Project stated in its report on death penalty reform: “Whether such practices are ever warranted, skirting the line with the potential of denying fair play cannot easily be justified when the issue is whether to execute rather than to imprison.” *Mandatory Justice: Eighteen Reforms to the Death Penalty*, at 48, [http:// www.constitutionproject.org/dpi/](http://www.constitutionproject.org/dpi/) (2001).³

Prosecutors have the privilege of carrying a unique burden not only to vigorously represent their client, but also to see that justice be done. Ninth Circuit Court of Appeals Judge Stephen Trott, himself a former prosecutor, aptly described this privileged burden:

I can’t think of a better job than to be a prosecutor. It’s an absolutely amazing opportunity. It’s the luxury of a lifetime to be able to pursue only those things that are right. You are unencumbered by the bad ideas of a client who is paying you money. You are only encumbered by your own desire to do the right thing and make sure justice is done. [Quoted in Douglass, *Ethical Issues in Prosecution* 31 (1988).]

After reviewing this case, *Amici* are convinced that had the prosecution properly discharged its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), the Petitioner, Mr. Spirko, would have received a fundamentally different trial. Allowing the decision of the Sixth Circuit to stand without further inquiry would exalt gamesmanship over truth-seeking. The

³ Based at Georgetown University, the Constitution Project seeks to develop bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education. Judge Gibbons and Judge Sessions are members of the Constitution Project’s Death Penalty Initiative, a bipartisan committee dedicated to eliminating the unacceptably high risk of wrongful executions. Judge Lewis serves on the Constitution Project’s bipartisan, blue-ribbon Right to Counsel Initiative.

issues presented by this case are therefore of vital importance to the judges, prosecutors, and defense counsel who fulfill essential functions in the criminal justice system.

STATEMENT OF THE CASE

John Spirko was convicted of kidnapping and murdering Betty Jane Mottinger and sentenced to death in Ohio state court. The prosecution presented to the jury the theory that Mr. Spirko and his “best friend” Delaney Gibson entered the small-town post office where Mrs. Mottinger worked; stole some change, money orders, and stamps; kidnapped Mrs. Mottinger; and later murdered her to cover up their crimes.

Lacking any physical evidence to link Mr. Spirko to the crime, the prosecutors relied upon several other items of evidence. They presented the eyewitness testimony of Opal Seibert placing a clean-shaven Mr. Gibson at the post office in Elgin, Ohio, on August 9, 1982, the morning in question. They presented a witness who was “seventy-percent” sure that he saw Mr. Spirko at the post office. They presented the jury with statements made by Mr. Spirko to investigators (Mr. Spirko had approached the government with information about the crime while in custody for a parole violation and was seeking leniency in exchange for information), which allegedly disclosed nonpublic information about details of the crime.

But the prosecutors neither presented to the jury, nor disclosed to Mr. Spirko, the fact that they possessed photographs, receipts, and witness statements placing Mr. Gibson in North Carolina on August 7-8—more than 500 miles from the scene of the crime. Nor did the prosecutors disclose witness statements that Mr. Gibson wore a beard the entire summer in question, contrary to Ms. Seibert’s identification of a photo of a clean-shaven Mr. Gibson. Mr. Spirko and his attorneys did not obtain this information until twelve years after his conviction.

For most of those twelve years, Mr. Gibson was incarcerated in Kentucky for an unrelated crime. Although the

prosecutors used an eyewitness identification of Mr. Gibson to link Mr. Spirko to the crime, they never filed a detainer against Gibson to try him for the murder. Indeed, on the same day that the Sixth Circuit denied Mr. Spirko's habeas petition in this proceeding, the State of Ohio dismissed the indictment against Mr. Gibson. Having served his time in Kentucky, Mr. Gibson is a free man.

SUMMARY OF ARGUMENT

The prosecution possessed evidence that contradicted one of its central links connecting Petitioner to the crime—the eyewitness identification of Mr. Gibson, Petitioner's best friend, at the scene of the crime. Rather than disclosing the photos and receipts that placed Mr. Gibson in North Carolina the day before the crime, the prosecution only provided the defense with a misleading, half-true statement. The prosecution compounded this error by proceeding before the jury with a theory of the case that was contradicted by the withheld evidence. Finally, the prosecution presented testimony from the lead investigator asserting that certain information provided by Petitioner in interviews was nonpublic, when in fact most of that information had been published in several newspapers.

Amici are troubled by the revelations of prosecutorial misconduct and other subsequent developments in this case. A misleading, half-true statement may in no circumstances satisfy a prosecutor's *Brady* obligations; nor may a prosecutor, whose role is to seek the truth rather than a conviction, present a case to a jury while withholding evidence that contradicts a central tenet of that case. These revelations make this an appropriate case for this Court to further reinforce prosecutorial obligations under *Brady* by holding: first, that misleading, half-true disclosures cannot satisfy *Brady* when the prosecution possesses tangible exculpatory evidence; and second, that due process demands that prosecutors may not present a theory of the case to a jury while withholding any evidence from the defendant (and thus the jury) that contradicts or undermines that theory.

ARGUMENT

I. THE FAIR ADMINISTRATION OF THE CAPITAL SENTENCING SYSTEM REQUIRES SCRUPULOUS ADHERENCE TO *BRADY*

A study evaluating error rates in capital cases from 1973 to 1995 concluded that the two major flaws in the system—resulting in the majority of post-conviction reversals—were incompetent defense counsel who failed to uncover exculpatory evidence, and prosecutors or investigators who did uncover such evidence, but suppressed it. James Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at ii, <http://justice.policy.net/jpreport> (June 12, 2000). In May 2000, the Constitution Project established a committee to address “the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death.” *Mandatory Justice* at ix. The committee’s report identified the same two persistent problems in the death penalty system as it is currently administered. *Id.* at 1, 50.

Improving the quality of capital representation will require the commitment of additional resources necessary to compensate and train overworked defense counsel. There is bipartisan support to commit some of the required resources. In 2004, Congress passed, and the President signed, the Justice for All Act of 2004, which commits substantial funding for DNA testing and improving capital representation to further ensure the innocent are exonerated at trial or in post-trial proceedings. Pub. L. No. 108-405, 118 Stat. 2260. In his recent State of the Union address, President Bush reiterated a commitment to fund more DNA testing and better training for capital defense attorneys. <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html>.

These efforts are important steps towards addressing the issue of inadequate defense counsel. But they fail to address the other major flaw in the system—failure of prosecutors to disclose all exculpatory evidence. Unlike improving repre-

sensation of capital defendants, remedying this latter flaw will not require any additional funding. Instead, it will require only that this Court reinforce its guidance to prosecutors as they try to determine how to best meet their constitutional obligations.

II. A PROSECUTOR MUST DO MORE TO SATISFY *BRADY* OBLIGATIONS THAN DISCLOSE MISLEADING HALF-TRUTHS.

For the Court to grant relief under *Brady*, “[t]he evidence at issue must have been favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (internal quotation marks omitted).

The *Brady* obligation is important in all criminal contexts, but it is of the gravest importance when life is at stake. A sentence of death is qualitatively different from all other sentences in kind, rather than degree. A reviewing court, and we as a society, must be confident that a jury’s sentence of death in a particular case is reliable in all respects.

[T]he penalty of death is qualitatively different from a sentence of imprisonment. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. [*Solem v. Helm*, 463 U.S. 277, 312 n.4 (1983) (Burger, C.J., dissenting, joined by White, J., Rehnquist, J., and O’Connor, J.) (*quoting Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, J., Powell, J.,

and Stevens, J.)), *overruled, Harmelin v. Michigan*, 501 U.S. 957 (1991).]

When this ultimate penalty is at issue, justice demands scrupulous conduct from prosecutors. It is not enough for a prosecutor to weigh all of the evidence, determine that a defendant is guilty, and pursue such a verdict vigorously if he holds back information unfavorable to his desired outcome. This usurps the authority of the jury, which can act as an effective factfinder only when presented with all necessary information. Disclosure “will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.” *Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

A. *Brady* and Its Progeny Mandate that Prosecutors Make Truthful and Complete Disclosures of Exculpatory Evidence, Irrespective of Their Good Faith.

Seventy years ago in *Berger v. United States*, 295 U.S. 78 (1935), this Court articulated the contours of “the special role played by the American prosecutor in the search for truth in criminal trials.” *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. * * * It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. [*Berger*, 295 U.S. at 88.]

Even before *Berger*, this Court had enunciated the basic principle that a prosecutor’s “deliberate deception of court

and jury by the presentation of testimony known to be perjured” is “inconsistent with the rudimentary demands of justice.” *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). After *Berger*, this Court continued to clarify the constitutional dimensions of a prosecutor’s duties. Even when the state does not affirmatively present the falsehood, “[t]he same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Napue v. Illinois*, 360 U.S. 264, 269 (1959). See also *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam).

The Court extended a prosecutor’s obligation that “justice be done” to discovery of exculpatory evidence more than forty years ago, holding in *Brady v. Maryland*, 373 U.S. 83 (1963), that a defendant’s due process rights encompass the right to learn before trial of evidence that is “material to either guilt or punishment, *irrespective of the good faith or bad faith of the prosecution*.” 373 U.S. at 87 (emphasis added). Later the Court added that “[w]hen the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.” *Giglio v. United States*, 405 U.S. 150, 154 (1972) (quoting *Napue*, 360 U.S. at 269). Indeed, the Court has since held that a prosecutor is responsible for disclosing “any favorable evidence known to others acting on the government’s behalf in the case, including the police,” even if the prosecutor is unaware of the evidence. *Kyles*, 514 U.S. at 437.

These cases establish that a prosecutor—especially in a capital case—must exercise his *Brady* obligations with the utmost care by making truthful and complete disclosures of exculpatory evidence. If a prosecutor fails to meet these obligations, regardless of his good faith or even lack of negligence, he deprives the defendant of due process.

B. The Prosecution Did Not Satisfy Its *Brady* Obligations With Its Incomplete and Misleading Disclosure.

The *Brady* standard for truthful and complete disclosures is not satisfied when a prosecutor only hints at favorable evidence in his possession, or makes misleading half-true statements about that evidence—*Brady* does not countenance a game of “hide and seek” between prosecution and defense. Just last term, the Court held in *Banks v. Dretke*, 540 U.S. 668 (2004), that evidence of a penalty phase witness’s paid informant status was material for *Brady* purposes. 540 U.S. at 692.

This Court displayed little patience with the State’s argument in *Banks* that “the prosecution can lie and conceal and the prisoner still has the burden to...discover the evidence,” so long as the “potential existence” of a prosecutorial misconduct claim might have been detected. *Id.* at 696 (quoting transcript of oral argument). The Court found such a rule inimical to due process: “A rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.” *Id.* A defendant must be able to count on a prosecutor’s duties being “‘faithfully observed,’” and a prosecutor’s dishonest or unwarranted concealment of exculpatory evidence “should attract no judicial approbation.” *Id.* (quoting *Berger*, 295 U.S. at 88).

Judicial approval must similarly be withheld when a prosecutor makes disclosures that are misleading and incomplete. The faithful observation of *Brady* obligations cannot include disclosures that are only half-true; a defendant is entitled to rely on a prosecutor not to hide half of the truth just as he must not hide all of the truth.⁴ It would work an injustice to hold that a prosecutor is charged with disclosing what he does not know—as in *Kyles*—but may tell only half of what he does know—as the Sixth Circuit held here.

The State's disclosures regarding the whereabouts of Mr. Gibson on the days immediately prior to the murder consisted of interview memoranda of Mr. Gibson and his wife, Margie, and the following description of an interview of Michael Bentley:

Information Concerning Delaney Gibson.

Mr. Michael Bentley, Box 425, Ary, Kentucky, 41712, has stated that Delaney Gibson was with him and his wife in North Carolina on 8/7/82 and 8/8/82 and that pictures are purported to have been taken of the weekend in question. [App. 15.]

⁴ In the context of the criminal law, the courts of appeals have recognized that half-truths are actionable misrepresentations under the mail and wire fraud statutes. False representations include “deceitful statements of half truths or the concealment of material facts.” See, e.g., *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967); *United States v. Olatunji*, 872 F.2d 1161, 1167 (3rd Cir. 1989); *United States v. Buckley*, 689 F.2d 893, 897-898 (9th Cir. 1982). The term “half truth” includes statements that are “literally true but [are] made misleading by a significant omission.” *Bonilla v. Volvo Cars, Inc.*, 150 F.3d 62, 29 (1st Cir. 1998).

The State also disclosed a photograph of a clean-shaven Mr. Gibson. App. 110.

A significant portion of this disclosure is not even literally true: the photographs here were not “purported,” they were tangible, in the sole possession of the State, and accompanied by other corroborating physical evidence. The Bentleys provided investigators with 40 photographs showing Mr. Gibson with a full beard, and with receipts from an automotive store in North Carolina dated August 7 and from a hotel in Newport, Tennessee, where the Bentleys stayed on August 8, the same weekend that they said the photographs were taken. App. 27. Margie Gibson provided investigators with 18 photographs that she stated were taken during the same time period, all of which also showed a bearded Mr. Gibson. *Id.* The State’s “disclosure” is exactly the type of “hide and seek” condemned in *Banks*.⁵

⁵ Petitioner did not discover the *Brady* material until 1996 and 1997, after the state proceedings had concluded. Because Petitioner’s habeas petition predates the Antiterrorism and Effective Death Penalty Act of 1996, he must demonstrate cause for his failure to raise the claim in state proceedings and resulting prejudice from the violation, as the petitioners did in *Banks* and *Strickler*. In the *Brady* context, the cause and prejudice inquiry parallels two of the three components of the *Brady* violation itself. *Banks*, 540 U.S. at 691. Petitioner’s cause for failing to raise the issue in state proceedings is the prosecution’s suppression of evidence addressed in Section II. Prejudice is demonstrated in Section III, *infra*.

The prosecution’s misleading disclosure is not sufficient to justify concluding that Petitioner should have discovered the exculpatory material earlier. In *Strickler v. Greene*, 527 U.S. 263 (1999), the Court held that the petitioner could not be faulted for relying on the prosecutor’s statement that his open file policy obviated the need for a *Brady* motion. *Id.* at 283-84. In *Banks* the Court held that cause existed because (a) the State knew its witness was a paid informant; (b) the State represented it would disclose

C. By Presenting Evidence It Knew was False to the Jury, the Prosecution Ignored Supreme Court Precedent and Violated A Fundamental Obligation of its Office.

The prosecution's obligation to refrain from presenting false or misleading evidence at trial is even more fundamental to the integrity of the criminal justice system than the prosecution's obligation to disclose exculpatory evidence under the *Brady* rule. The *Mooney*, *Berger*, and *Napue* decisions establish not only the special obligations of the prosecutor, but also the courts' duty to ensure that the prosecutor's conduct comports with the interests of truth and justice. Yet, in denying Mr. Spirko's petition, the Sixth Circuit ignored this issue.

The prosecution's obligation to seek the truth, and not just a conviction, is one on which the jury relies as it evaluates the evidence. *Berger*, 295 U.S. at 88. When the prosecution uncovers evidence that raises any doubt about the truthfulness of its case, that case must not be presented to the jury without also disclosing the exculpatory evidence. "The prudence of the careful prosecutor should not ... be discouraged." *Kyles*, 514 U.S. at 440. In *Banks*, this Court reaffirmed that the presentation of known false evidence to the court and jurors is "incompatible with rudimentary demands of justice," and ordered an evidentiary hearing for a con-

all *Brady* material; and (c) the State confirmed the petitioner's reliance on that representation. 540 U.S. at 693. In this case, the State knew about the photographs and corroborating receipts. Petitioner made a formal motion for access to *Brady* materials. The parties compromised on a procedure whereby the trial court appointed a special master to review the investigation files. Pet., at 10. The special master's report made no mention of the photographs and corroborating receipts, giving petitioner no basis on which to challenge the district court's denial of his motion. See App. 115-120. The State made no effort to correct this omission.

victed capital murder defendant because the prosecution had allowed one of its key witnesses to misrepresent his informant status to the jury. 540 U.S. at 694-703.

What makes this case more troubling than *Banks* is that while the false information in *Banks* ultimately went to witness credibility; here, the false information held together the entire theory of the prosecution's case-in-chief. Despite this difference, prosecutorial conduct "incompatible with rudimentary demands of justice" was not even addressed by the Sixth Circuit in its decision below; the Court of Appeals neither cited nor discussed *Banks*.⁶

Linking Mr. Spirko to the crime scene through the eyewitness identification of Mr. Gibson was a key aspect of overcoming the total lack of physical evidence against Mr. Spirko. The prosecution argued during closing:

Now, the defense is going to say that Mark Lewis was seventy percent sure; and as a representative of the State of Ohio, I am not going to come up here and say that seventy percent is beyond a reasonable doubt. * * * [Y]ou have to take that identification in conjunction with all of the statements the Defendant has made, the pretrial confessions, the total picture, *and with the identification that Opal Siebert made.*

* * *

That identification is there. Delaney Gibson was there that morning, and he had a blue

⁶ Petitioner brought *Banks* to the Sixth Circuit's attention in a Rule 28(j) letter. App. 125-126. The issue of whether the prosecution denied Mr. Spirko due process by knowingly presenting false evidence and a false theory of the case at trial was presented to the Sixth Circuit for decision, but the court chose to address only the *Brady* claims. App. 2.

shirt on, and he had the dark eyebrows and the dark hair.

Now, take Mark's identification, take the fact that these two were the most important persons to each other, the best friends in the whole world, and put that all together as a package * * *. [See C.A. App. 776-778 (emphasis added).]

To properly weigh the case against Mr. Spirko the jury needed to know that this identification was countered by evidence placing a bearded Mr. Gibson more than 500 miles away. Even ignoring the inherent inaccuracy of eyewitness identifications,⁷ the evidence in the sole possession of the State raised significant doubts about Ms. Seibert's identification of Mr. Gibson at the scene. But the State presented to the jury a theory it knew was false—or at least highly questionable. The State's failure to even attempt to try Mr. Gibson for the murder, especially before the defense's discovery of the withheld alibi evidence, is essentially an admission that the State knew the case against Mr. Spirko was inaccurate.⁸

⁷ At least since *United States v. Wade*, 388 U.S. 218 (1967), the Supreme Court has viewed eyewitness identification evidence with suspicion.

⁸ This Court recently granted the Petition for a writ of Certiorari in *Stumpf v. Mitchell*, 367 F.3d 594, 611 (6th Cir. 2004) (Petition for Writ of Certiorari granted Jan. 7, 2005 No. 04-637), to resolve whether the use of inconsistent, irreconcilable theories to convict two defendants of the same crime is a due process violation. What has happened to Mr. Spirko is not much different. To convict Mr. Spirko, the State relied on a theory that he and Mr. Gibson jointly committed the murder; in failing to prosecute Mr. Gibson, the State made a determination that it could not prove that Mr. Gibson was involved in the murder.

III. THE WITHHELD EVIDENCE UNDERMINES CONFIDENCE IN THE VERDICT AND SENTENCE.

The prosecution's misconduct altered the course of Mr. Spirko's trial, poisoning the resulting conviction and sentence. To show prejudice, a defendant must demonstrate "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Strickler*, 527 U.S. at 290 (quoting *Kyles*, 514 U.S. at 435), or the "reasonable probability of a different result." *Banks*, 540 U.S. at 698-699 (citing *Kyles*, 514 U.S. at 435).

A. The Withheld Evidence Fundamentally Altered the Prosecution's Presentation of Its Case.

The proof placing Mr. Spirko at the crime scene on August 9 consisted of three pieces of evidence: (1) Opal Siebert's testimony that she was "100 percent sure" she saw Mr. Gibson near the post office on the morning of the murder, *see* App. 23, 26, and that she "don't forget a face," *see* C.A. App. 722; (2) Mark Lewis's hypnotically refreshed testimony that he was "seventy percent" sure that Mr. Spirko was at the scene, *see* C.A. App. 577D, 776; and (3) Mr. Gibson and Mr. Spirko's close friendship, *see* C.A. App. 778. The friendship and Mr. Gibson's "undisputable" presence at the scene both bolstered and corroborated the less-than-certain eyewitness identification of Mr. Spirko.

The trial transcript reveals that the Gibson-Spirko-accomplice theory was not an incidental detail, but permeated throughout the prosecution's case. In its opening statement, for example, the prosecution urged, "You will discover that at approximately 8:30 a.m. on the morning of August 9, 1982, the defendant and his closest friend in the world, Delaney Gibson, Jr., then entered the Elgin Post Office." *See* C.A. App. 557; *see also id.* at 558-559, 776-778. In its closing argument the prosecution again asserted that Ms. Seibert's identification of Mr. Gibson was crucial to link Mr. Spirko to the crime. *See id.* 776-778; *supra* Sec.

II.C. Mr. Gibson's presence in Elgin, Ohio, on the morning of August 9 was essential to the story the prosecution told.

The proper operation for analyzing prejudice in this context is not simple subtraction: to determine prejudice here is not to take all the pieces of evidence against Mr. Spirko and subtract Mr. Gibson's presence (as did the Sixth Circuit). At trial, the prosecution presented an inclusive, coherent theory built on the foundation that Mr. Spirko and Mr. Gibson worked in concert. Take away that foundation, and the theory crumbles. *See*, App. 23 (referring to the case against Mr. Spirko as built on "a foundation of sand") (Gilman, J., dissenting). In short, the prosecution's failure to turn over evidence had far-reaching effects because nearly every inference the prosecution asked the jury to draw rested on the underlying premise that Mr. Spirko and Mr. Gibson were in Elgin on the morning of August 9.

B. Details of the Crime Were Publicly Available.

In finding that Mr. Spirko was not prejudiced by the prosecution's failure to turn over evidence, the Sixth Circuit held that Mr. Spirko would have been convicted based solely on his knowledge of certain "nonpublic" facts about the murder:

Finally, we must consider whether, even if any of this evidence met the *Brady* requirements, Spirko would have been convicted on evidence unaffected by that which was not disclosed. We hold that clearly he would. * * * Spirko's conviction rested in large measure on his knowledge of non-public facts about the crime, all of which he volunteered to the investigators. [App. 22.]

The Sixth Circuit's approach is not only legally flawed, but factually erroneous: most of the "nonpublic" details on which the Sixth Circuit relied had been published in local newspapers before Mr. Spirko first spoke with investigators in October 1982.

The Sixth Circuit cited Mr. Spirko's knowledge of "the number and location of stab wounds on Mrs. Mottinger's body." App. 9. But local newspapers contained numerous reports that "Mrs. Mottinger was stabbed in the chest at least 13 times." See Jack A. Seamonds, *Elgin Postmistress Mourned as Agents Search Crime Scene*, The Times-Bulletin (Van Wert) Sept. 21, 1982, at 1; see also *Postmaster's Body Found*, The Lima News, Sept. 20, 1982, at 1.

A "description of the clothing Mrs. Mottinger had been wearing," App. 9, had also been published, see *Clues Sought in Abduction of Postmistress*, The Lima News, Aug. 10, 1982, at 1 ("Authorities say Mrs. Mottinger was wearing a light colored blouse with a design on the front and dark slacks when last seen on duty about 8:20 a.m. Monday.").

And "a description of the type of fabric the body was wrapped in as well as a description of the way the body was wrapped," App. 9, had been reported in several newspaper articles, see, e.g., *Body of Mrs. Mottinger Found*, The Times-Bulletin (Van Wert), Sept. 20, 1982; *Postmaster's Body Found*, The Lima News, Sept. 20, 1982, at 1; Seamonds, *supra*, at 1; *Material Could Be Key to Elgin Case*, The Lima News, Oct. 21, 1982.

That these facts were publicly reported before Mr. Spirko began talking to investigators calls into question whether the remaining "nonpublic" information was actually nonpublic. Of the facts the Sixth Circuit recounted, *Amici* have located contemporaneous newspaper accounts reporting on all but two: (1) "[t]he fact that a stone had been pried from a ring she had been wearing," and (2) "[a] description of [the victim's] purse" and its contents. See App. 9. These could be facts Mr. Spirko told to investigators that only the killer or someone involved in the murder could have known. But perhaps they were contemporaneously reported in television or radio news reports. Or perhaps they were circulated as part of the rumor mill or word-of-mouth reports about the progress of the investigation. Or perhaps the investigators actually suggested these facts to Mr. Spirko. *Amici* cannot say which of these possibilities is correct. But the addition of

the Gibson evidence, and the subtraction of the above non-public facts presents a case substantially different than that considered by the jury—and creates a reasonable probability that the jury would have made different decisions on guilt or the sentence.

C. Evidence Exculpating Mr. Spirko of Kidnapping Alters Evaluation of the Aggravating Factors Supporting the Death Penalty.

Although the withheld evidence casts doubt on Mr. Spirko's participation in the crime generally by undermining the prosecution's theory of the case, it casts even stronger doubt on his involvement in the kidnapping in Elgin on August 9, 1982. If Mr. Spirko was not involved in the kidnapping, then one of the aggravating factors justifying the death sentence is eliminated. Even if the exculpatory evidence were not sufficient to invalidate Mr. Spirko's conviction on the murder charge, the elimination of kidnapping as an aggravating factor entitles him to a new sentencing proceeding.

The jury found two aggravating circumstances in support of the death penalty: Mr. Spirko had previously been convicted of murder, and the Mottinger murder was committed “for the purpose of escaping detection, apprehension, trial and punishment for the kidnapping of Betty Jane Mottinger committed by him.” *See, e.g., State v. Spirko*, No. 15-84-22, 1989 WL 17732 at *1 (Ohio Ct. App. March 6, 1989) (emphasis added); *State v. Spirko*, 570 N.E.2d 229, 266 (Ohio 1991). If the suppressed evidence could lead a jury to acquit Mr. Spirko on the kidnapping charge, the jury could not have found the kidnapping an aggravating factor, and its sentencing calculus would have changed—there would have been only one aggravating factor to weigh. *See State v. Spirko*, 570 N.E.2d at 264 n.10, 266 (Ohio 1991) (reviewing aggravating and mitigating factors). And under Ohio law, a reviewing court cannot itself reweigh aggravating and mitigating circumstances “where the result of the weighing process, had the correct factors been present, is unknown.” *Stumpf v. Mitchell*, 367 F.3d 594, 618 (6th Cir. 2004).

CONCLUSION

As *Amici* examined the prosecutorial conduct in this case, and the developments since trial, they have been troubled by the following question: What remains of the case the jury relied on to convict and sentence John Spirko?

The prosecution claimed Mr. Spirko was involved in the kidnapping and murder because his best friend Delaney Gibson was positively identified at the scene of the crime. But the prosecution had in its sole possession undisclosed evidence that Mr. Gibson was probably more than 500 miles away.

The Sixth Circuit argued the jury still would have handed down a conviction and death sentence because the prosecution had highlighted six nonpublic facts that Mr. Spirko told investigators—facts that only the killer could have known. But most of those facts were published in newspapers before Mr. Spirko began talking to investigators.

The prosecution contended Mr. Spirko was involved because an eyewitness was seventy-percent certain he saw Mr. Spirko at the scene of the crime. But the prosecution admitted such an identification was not proof beyond a reasonable doubt—and this Court has stated that uncorroborated eyewitness testimony is notoriously unreliable.

The prosecution encouraged the jury to take all these pieces of evidence “as a package” to find that Mr. Spirko had committed the crime. But that whole cloth has since unraveled down to the thread of two possibly nonpublic facts an investigator asserted Mr. Spirko told him—and that investigator was demonstrably wrong in his assertion that the other facts were nonpublic.

A man’s life should not dangle by so thin a thread when there exists the opportunity for further inquiry.

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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